IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 8288 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VIJAY SHOBHALAL SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 8288 of 2002

MR WARIS MANSURI for MR MM TIRMIZI for Applicant No.1

MR AJ DESAI, APP for Respondent No. 1

CORAM : MR.JUSTICE D.A.MEHTA

Date of decision: 20/12/2002

ORAL JUDGEMENT

1. This is an application filed seeking Anticipatory Bail in relation to offence registered as Crime Register No.I 139/2002 with Bardoli Police Station.

2. In this application the following averments have been made in the petition.

"3. That the petitioner had mortgage 20 flats

of the Royal Plaza, Fifth Floor, in lieu of the overdraft of Rs.15,00,000/= in current account and title deed was registered before the Sub-Registrar, Bardoli on 29/10/2002. The petitioner craves leave to annex the copy of the registered title deed, as ANNEXURE "C" to this application is the copy of the registered title deed.

4 (b) That the petitioner is a reputed businessman having no criminal antecedents. Petitioner is doing the business in the name of the Tulsi Processors Pvt. Ltd. Petitioner is falsely implicated on the statement of the complainant bank manager. That the petitioner had made an application for an overdraft of Rs.30 lakes on his Current Account with the complainant's bank and agreed to mortgage 30 flats. But the complainant's bank had passed an overdraft of Rs.20 lakes and therefore petitioner had mortgaged 20 flats only against the said overdraft of Rs.20 lakes. That the petitioner had mortgaged the flat No.401 to 410 of forth floor and 501 to 510 of the fifth floor. Whereas petitioner had sold the float No.310 which is located on third floor and not mortgage against the said overdraft. Therefore the complaint is false and required to be quashed and set aside. This fact can be verified from the Index of the Registered document. Moreover the value of the flat is worth Rs.1,35,000/= only. Complainant has falsely stated the 20 lakes as value of the flat sold by the complainant. Therefore this is the fit case to release the petitioner on anticipatory bail. "

3. On 28-11-2002 when the matter was listed for hearing, after hearing Mr.Tirmizi, the learned advocate for the applicant, the Court had specifically put to him that averment made to the effect that the applicant had not mortgaged Flat No.310, located on 3rd Floor against overdraft obtained by the applicant from The Bardoli Nagrik Sahakari Bank Ltd., did not appear to be prima facie correct. However, the learned advocate for the applicant insisted that as the said averment was factually correct, notice may be issued so as to verify

the said aspect. It was then made clear to the learned advocate for the applicant that in case the averments made in the petition are found to be incorrect, the Court shall not grant permission to withdraw the application.

4. On the returnable date i.e. on 18-12-2002, in light of the sick-note of Mr.Tirmizi, the learned advocate for the applicant, the matter was kept today despite the fact that the Investigating Officer from Surat had remained present on 18-12-2002. Today, the matter was called out thrice in the first session and once again in the second session. It was mentioned by Mr.Mansuri for Mr.Tirmizi for the applicant that as Mr.Tirmizi is busy in another Court, the matter may be adjourned. When it was pointed out to Mr.Mansuri, the learned advocate mentioning on behalf of Mr.Tirmizi that the Investigating Officer from Surat is present even today and why cost should not be imposed, a request is made to withdraw this application.

5. Having gone through the record and the police papers, it is more than clear that the averment made in the petition that Flat No.310 of 3rd Floor has not been mortgaged with The Bardoli Nagrik Sahakari Bank Ltd. is incorrect, to say the least.

6. Section 438 of the Code of Criminal Procedure as is material for the present purposes reads as under:

> "438. Direction for grant of bail to person apprehending arrest.--(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail. "

On a plain reading of the section, it is apparent that the following conditions precedent have been prescribed by the statute:

(i) The applicant has reason to believe that he is likely to be arrested for a non-bailable offence.

(ii) The applicant is required to establish likelihood of imminent arrest.

(iii) The Court (High court or a Sessions

Court) is thereupon required to examine objectively whether the apprehension expressed by the applicant in the application is well-founded.

7. Once the aforesaid pre-requisite conditions stand satisfied, the Court is then required to independently apply its mind whether a case is made out for enlarging the applicant on bail in anticipation of arrest and arrive at a decision on merits after overall consideration of facts and circumstances of the case. It goes without saying that the requirement of making decision on merits also permits the Courts to reject the application. Primarily, the Court is required to exercise its discretion in a judicious manner taking into consideration factors such as :

(a) whether the complaint is false or frivolous;

(b) that prima facie it is not shown that the applicant has committed the offence i.e. in other words, the applicant is not guilty of the offence alleged;

(c) the nature and gravity of the charge; and

(d) the severity and the degree of punishment for the offence alleged.

These factors are not exhaustive. Suffice it to state that all relevant considerations which would prevail for granting or refusing bail under Section 437 of the Code would also come into play. What is most material is that this provision viz. Section 438 of the Code is not a Rule, but an exception i.e. the right to Anticipatory Bail is not as a matter of course but by way of an exception in rare cases.

8. If, the aforesaid principles are applied to the facts of the case, this is not a case where it can be stated, prima facie, that the applicant is sought to be involved in a false case or is being implicated without there being any prima facie evidence. To the contrary, the applicant has sought to misguide this Court by placing reliance upon documents which only refer to properties other than the Flat (admittedly mortgaged with The Bardoli Nagrik Sahakari Bank Ltd.) which is sold off by the applicant despite the existing charge.

9. In these circumstances, no case is made out for

Anticipatory Bail and taking into consideration the facts which have come on record, the applicant cannot be permitted to withdraw this application. Permission refused.

10. The application stands rejected. The applicant to bear cost to the tune of Rs.4,000/= (Rupees Four thousand only). Notice discharged. Sd/-

[D.A.MEHTA, J]

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'Bhavesh'